SPARE SITHOLE

Versus

NOMUHLE MCLAREN

And

NEW BARRIER MINES (PRIVATE) LIMITED

And

THE PROVINCIAL MINING DIRECTOR, MATEBELELAND SOUTH

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 29 February 2024 & 25 April 2024

Court application

S. Farai for the applicant
L. Nkomo for the for the 1st and 2nd respondents

DUBE-BANDA J:

[1] This is a court application for condonation and for the extension of time to file a court application for review. The applicant seeks an order couched in the following terms: (i) the application for condonation for non-compliance with the rules of court relating to the time limits within which to file an application for review be and is hereby granted; (ii) the application for extension of time within which to file a review application be and is hereby granted; the applicant shall file its application for review within ten days of this order; and costs of this application shall be costs in the main cause.

[2] The application is opposed by all the respondents.

Background facts

[3] The applicant is the owner of Eric 9 Mine, while the first and second respondents are the owners of Annedale 12 Mine. The two mining claims share a boundary on their ground location. A boundary dispute arose and it culminated in a determination issued by the third respondent. The third respondent resolved that:

i. According to s 177, it is hereby deemed that the certificate of registration for Eric 9, registration number 11994BM was issued subject to that any portion of it overlapping Annedale 12 registration number 35490 is subordinated to Annedale 12.
ii. Spare Sithole, registered holder of Eric 9 is hereby ordered to adjust boundaries of Eric 9 outside Annedale 12 boundaries with immediate effect failure to which the office may consider recommending to the Minister cancellation of certificate for Eric.
iii. The workings under dispute are hereby confirmed to be inside Annedale 12 claim boundary.
iv. Any suspension of operations is hereby uplifted and New Barrier Mine P/L must enjoy mineral rights undisturbed within Annedale 12 boundaries.
v. Any party not concurring with the above may appeal to the High Court.

[4] The applicant was aggrieved by the determination of the third respondent and noted an appeal to this court. In case number HC 28/20 this court upheld points *in limine* taken by the respondents and struck the appeal off the roll with costs. Again, aggrieved by the order of this court, the applicant appealed to the Supreme Court. In case number SCB 49/21 the Supreme Court upheld the point *in limine* that the applicant did not seek leave of the High Court and struck the appeal off the roll with costs. Further the applicant filed case number HC 101/22 seeking the nullification of the third respondent's order. This application was withdrawn on 4 July 2022. Another application again seeking the nullification of the order is pending before this court. On 29 November 2021 the applicant filed this application seeking an order to be condoned to file an application seeking to review the order of the third respondent. On 11 September 2022 the first and second respondents filed a notice of opposition. On 12 October 2022 the applicant filed an answering affidavit, and on 19 October 2022 filed heads of argument. On 2 November 2022 the first and second respondents filed heads of argument.

[5] When the matter was ready for a hearing, it turned out that the notice of opposition filed by the first and second respondents was filed out of time. In answer to fact that the notice of opposition was filed out of time, the respondents filed a chamber application for upliftment of bar, which was granted on 7 November 2022. The court granted an order couched as follows:

i. The automatic bar against the filing of Notice of Opposition by the applicant in Case No. HC 1854/21 be and is hereby uplifted.

ii. The late filing of Notice of Opposition by applicants be and hereby condoned.
iii. The applicants shall file the opposing papers within 5 days of this order.
iv. There be no order as to costs.

[6] The first and second respondents did not file a notice of opposition within five days of granting of the order in HC 2039/22. They relied on the notice of opposition on record and filed on 11 September 2022. At the commencement of this hearing, the applicant submitted that the first and second respondents were barred for want of failing a notice of opposition in terms of paragraph 3 of the order. I heard argument regarding this issue and reserved judgment.

Applicant's case

[7] Mr *Farai* counsel for the applicant submitted that the first and second respondents were barred for failure to file a notice of opposition as ordered by this court. Counsel submitted that it was inappropriate for the respondents to rely on a process filed while under an automatic bar. It was incumbent for them to file an opposition as ordered by the court. Failure to file a notice of opposition rendered the first and second respondents barred.

The respondents' case

[8] Per *contra* Mr *Nkomo* counsel for the first and second respondents submitted that at the time the order was granted all the pleading in this matter were on record. Counsel argued that paragraph 2 of the order condoned the late filing of the notice of opposition, and it became unnecessary to file a notice of opposition when there was one on record. Counsel further submitted that the applicant did not use the procedure provided in r 43 of the High Court Rules, 2021 to expunge a copy of the notice of opposition which was on record. It was unnecessary to file a notice of opposition when there was one on record.

[9] Counsel submitted that the applicant's argument would have been tenable if one ignores paragraph 2 of the order. The notice of opposition that was filed prior to the order was not a nullity but an irregular proceeding as envisaged in r 43, which was condoned by the court and no practical purpose would have been served by filing another notice of opposition. Counsel argued that the preliminary point has no merit and must be refused.

The application of the law to the facts

[10] This preliminary objection turns on the interpretation of the order in HC 2039/22. The point of departure is to discuss the law on interpretation. In *Tapedza & 9 Ors v Zimbabwe Energy Regulatory Authority & Anor* SC 30/20, the Supreme Court, per HLATSHWAYO JA (as he then was) stated as follows at p 4:

> "It is an established principle of law that when interpreting a statute, the first cannon of interpretation to be applied is the golden rule of interpretation. This rule is to the effect that where the language used in a statute is plain and unambiguous, it should be given its ordinary meaning unless doing so would lead to some absurdity or inconsistency with the intention of the legislature. A provision of a statute should be given a meaning which is consistent with the context in which it is found." (My emphasis).

[11] The learned Judge also cited *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264 D - E where Mc NALLY JA stated the following:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as LORD WENSLEYDALE said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.'"

[12] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) the court said:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (My emphasis).

[13] Paragraph 3 of the order which says the applicants shall file the opposing papers within five days must be interpreted consistent with the context of the background facts and order in its entirety. It cannot be read in isolation. The first and second respondents filed the *contested* notice of opposition, the applicant filed an answering affidavit and both parties filed heads of argument. The court uplifted automatic bar and condoned the late filing of notice of opposition. At the time of the order, the notice of opposition was already on record, *albeit* as an irregular process. It was not expunged from the record in terms of r 43 of the High Court Rules, 2021. The court saw it and condoned its late filing, thus making it a regular process, meaning it was deemed to have been properly before court.

[14] I take the view that paragraph 3 was meant to take care of a situation where, for whatever reason a notice of opposition had to be filed afresh, in such a case it had to be filed within five days of the order. Paragraph 3 could not have been meant to undo what paragraph 2 had given, i.e., the condoning of the late filing of the opposition which was on record. The only interpretation that makes sense rather than a mockery of justice is one which says the court condoned the late filing of the opposition which was already on record and that the filing of a new notice opposition within five days was discretionary. It is in such a case that the court must find an interpretation which achieves sense rather than injustice. This must be specially so in interpreting such an order which deals with matters of procedure.

[15] I need to deal with the fact that the order in paragraph 3 uses the word 'shall' which is generally peremptory. In *Moyo & Ors v Zvoma NO, Clerk of Parliament* SC 28/10 the court said:

> "In my view, the use of peremptory language, such as the words "shall" or "must" in a Statute is no longer conclusive evidence of the intention of Parliament, but remains cogent evidence of such intention."

[16] In *casu* whether an the paragraph 3 should be construed as peremtory depends on, *inter alia,* the language in which it is couched; the context in which it appears; and the general scope and object of the text. To me the object of the order was to condone the late filing of the notice of opposition which was already on record. The late filing was indeed condoned. Again, after the granting of the order in HC 2039/22 the applicant did not seek to have the notice of opposition expunged in terms of r 43, only for counsel to stand at the commencement of this heearing and contend that there is no notice of opposition before court. Acceding to this objection would amount to placing form over substance. There is a valid notice of opposition on record. On the facts of this case no purose would have been served by filing a new notice of opposition. The applicant had answered it through an answering affidavit and both parties had filed heads of argument dealing with issues arsing from the notice of oppositipon. It is for these reasons that the prelimianry objection taken by the applicant has no merit and is refused.

Costs

[17] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. In this case there are good grounds for departing from the general rule. It is the actions or inactions of the first and second respondents, which did, to a large extent, contributed to the present scenario. The justice of the case requires that there be no order of costs.

Disposition

In the result, I order as follows:

i. The preliminary objection that there is no notice of opposition for the first and second respondent is dismissed with no order as to costs.

ii. The Registrar of the High Court is directed to set down this matter for the continuation of the hearing.

Farai & Associates Law Chambers, applicant's legal practitioners
Malinga & Mpofu, 1st and 2nd respondents' legal practitioners